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Supreme Court of the United States.

No. 206.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

DAVID W. JAMES.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
GEO. H. FEARONS,
RUSH TAGGART,
Attorneys for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

DAVID W. JAMES.

This case comes into this court by writ of error from the Supreme Court of Georgia. The plaintiff in error challenges the judgment of that tribunal upon the ground that the judgment is based upon a statute of the State of Georgia, which is claimed to be in violation of the Commerce Clause of the Federal Constitution. The act in question was passed by the General Assembly of the State of Georgia on October 22d, 1887, and is as follows :

AN ACT to prescribe the duty of Electric Telegraph Companies as to receiving and transmitting dispatches, to prescribe penalties for violations thereof, and for other purposes.

SECTION I. Be it enacted by the General Assembly of the State of Georgia, and, it is hereby enacted by authority of the same, that from and after the passage of this act, every electric telegraph company with a line of wires, wholly or partly in this State and engaged in telegraphing for the public, shall during the

usual office hours receive dispatches whether from other telegraphic lines or from individuals; and, on payment of the usual charges according to the regulations of such company, shall transmit and deliver the same with *impartiality and good faith* and with *due diligence* under penalty of one hundred dollars, which penalty may be recovered by suit in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue: Provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

SECTION II. Be it further enacted, that such companies shall deliver all dispatches to the persons to whom the same are addressed or to their agents, on payment of any charges due for the same. Provided, such persons or agents reside within one mile of the telegraphic station or within the city or town in which such station is.

SECTION III. Be it further enacted, that in all cases the liability of said companies for messages in cipher, in whole or in part, shall be the same as though the same were not in cipher.

SECTION IV. Be it further enacted, that all laws or parts of law in conflict with this act be, and the same are hereby, repealed.

The record in the case at bar shows the following facts:

On the 4th day of November, 1890, James, the defendant in error (plaintiff below) was a cotton merchant in Blakely, Georgia. On that day John W. Tullis & Co. were in the same business at Eufaula, Alabama. James sent a message to Tullis & Co., offering to sell certain cotton on terms named in the message, and asked to have an answer that night. The agent of Tullis & Co. was then in Blakely, and the message referred to that fact, and asked that while there he might attend to inspection and acceptance of the cotton (Record, p. 9).

On the same day Tullis & Co. sent a telegraphic message in reply, advising acceptance of the offer upon certain conditions, one of which was provided their agent should be at Blakely to ship the cotton. This message was received at Blakely late in the evening of November 4th, but was not delivered until the morning of November 5th (Record, p. 10). The agent of Tullis & Co. left Blakely at 8:15 A. M. on the morning of November 5th, nearly two hours before the message was delivered. The office hours of the telegraph company at Blakely are from 8 A. M. to 8 P. M. of each day. This message was received at Eufaula at 9:45 P. M. on the evening of the 4th and reached Blakely at 10 P. M. that evening (Record, p. 12). The explanation of the receipt of this message at 10 P. M. that evening was the fact that the office was kept open until after that hour receiving election returns (Record, p. 18). The result of the delay in the delivery of this message was claimed by James to be the loss of a sale of the cotton upon the terms named in the message. He was unable to sell the cotton for some time and then he was compelled to accept a lower price for it (Record, p. 18).

In February, 1891, he filed his petition in the Superior Court of Early County, Georgia, alleging *inter alia* "that on the 4th day of November, 1890, said John W. Tullis & Co., having paid the corporation's charges therefor, sent by the same corporation a reply to the aforesaid copied dispatch, a message in the following words, to wit:

"EUFAULA, ALA., 11, 4, 1890.

"To D. W. JAMES, Blakely, Pithiness:

"We do not want the low grades, but as a favor to you will take them as offered, provided Mr. Winthrop

says they are full grade & is there to ship them. Show this to *to* Winthrop & ship chudding to Fall River and Chubby to Baltimore. Answer.

"JNO. W. TULLIS & CO."

Record, p. 9.

It then alleges delay in the delivery to the plaintiff of the message to him from Tullis & Co., asking judgment for special damages sustained by him and also alleging that the Western Union Telegraph Company "hath incurred the penalty of one "hundred dollars fixed by the statutes for failure to "transmit and deliver the said dispatch from Jno. W. "Tullis & Co. with impartiality and good faith and "with due diligence" (Record, p. 10).

The telegraph company in April filed its plea (Record, p. 11).

The said plea, in addition to the general issue and the denial of the alleged negligence, pleaded specially as follows:

"Defendant further shows that under the contract "of sending both of said messages set out in plaintiff's "declaration (a copy of which is hereto attached and "marked Exhibits 'A' and 'B') said plaintiffs should "not recover in this suit for the following reasons: "That said company is not responsible beyond the "amount received for toll for sending said message— "[which] was not repeated; and, if said message was "repeated, they would not be liable for more than 50 "times the amount received for sending the same. "Defendant further shows that under their contract "for sending said messages they are not liable to "plaintiff for damages as alleged, because their claim "was not presented in writing within 60 days after "sending the message."

Record, page 12.

By an amended plea the defendants pleaded that the plaintiff ought not to recover the statutory penalty of $100 sued for, because the message in question was an

interstate message and a part of interstate commerce (Record, p. 15).

In October, 1891, the case was tried and resulted in a verdict for plaintiff for one hundred dollars penalty and two hundred and forty-two and $\frac{60}{100}$ dollars damages (Record, p. 11). Upon this verdict judgment was entered (Record, p. 11). Motion for new trial was filed by the telegraph company upon various grounds, among others, (A), that the said telegram being an interstate message was not controlled by the Georgia Statute; (B), because of the following charge of the Court:

"I charge you that if the defendant telegraph company undertook to transmit to this place [a message], which had been paid for at the other end of the line and it failed to deliver the message to James within a reasonable time from the time it was received, the plaintiff is entitled to recover for the failure to deliver one hundred dollars as a penalty fixed upon that act by law;" and

(C), because the Court erred in the following charge to the jury:

"I charge you that, if you find that the message was not delivered within a reasonable time under the attending circumstances, your verdict should be for the plaintiff upon both propositions" [penalty and actual damages],

thereby distinctly raising a Federal question (Record, pp. 7, 16). The Federal question was also raised by the defendants' motion to dismiss the declaration (Record, pp. 6, 16).

The motion for new trial was overruled, bill of exceptions was taken and the case taken to the Supreme Court of Georgia (Record, p. 17). The Supreme Court reversed the judgment as far as it was based upon the actual damages claimed,

but affirmed the judgment for the penalty of $100 under the statute quoted above and for the costs (Record, pp. 22, 23, 24). Under the direction of the Supreme Court the plaintiff remitted the claim for special damages and the judgment for the penalty and costs was made the judgment of the Early County Superior Court (Record, p. 25). From this judgment the writ of error is prosecuted to this Court.

Errors Assigned.

The assignment of error in this Court is that the Statute of Georgia, which is above set out, is repugnant to Article I., Section 8, Clause 3 of the Constitution of the United States when applied to telegraphic messages sent from one State to another, the same constituting interstate commerce (Record, p. 5).

Also said statute of Georgia, as construed and applied by the Supreme Court of Georgia in this case, enforcing the penalty denounced in said statute, is a regulation of commerce within the meaning of the last-mentioned provision of the Constitution of the United States, and void because in conflict with it (Record, pp. 5–7).

ARGUMENT.

I.

As applied to interstate telegraphic messages, the statute of Georgia is an attempt to regulate commerce between the several States, which by the Federal Constitution Congress alone has the power to do.

The precise limitations upon State legislation, when it affects interstate commerce, cannot perhaps be definitely stated, nor is it necessary for the purposes of this case that it should be thus defined. It is enough to ascertain whether the legislation in question transcends any of the limits which this Court has already fixed.

The act in terms requires every telegraph company with a line of wires wholly or partly in this State to receive dispatches from other lines or from individuals, during the usual office hours; and upon payment of the usual charges, according to the regulations of such company, to transmit and deliver the same with impartiality and due diligence, under penalty of one hundred dollars. As interpreted by the Supreme Court of Georgia in this case, all messages upon all telegraph lines within that State whether limited in their transit to points within the state or not, were to be handled subject to the provisions of this statute.

If the statute of Alabama, in which State this message originated, defined a different order of transmission and delivery, this Georgia statute met the message at the State line and changed that rule, and imposed its own rule for such transmission and delivery within the State of Georgia.

Regardless of the extent of such control and regulation, is it such regulation as is permissible under the rules established by this Court? Congress has not attempted to legislate upon the subject of the order of transmission of messages, except by Section 5266, R. S., which defines the right to priority of telegrams sent by officers of the Government upon certain lines therein described. If these lines belong to that class, this statute of the State very clearly fixes a different order of transmission. Independently of this legislation, and in the absence of any action of Congress upon this subject, was it competent for the State of Georgia to make a rule for the transmission and delivery of telegrams which should control all messages coming from another State into that State, or going from that State to another State, or passing through that State? If the judgment of the Supreme Court of Georgia is correct in this case, then all the above-described classes of messages fall equally within the control of the statute, and the telegraph company, if it is adopting an order of transmission and consequent delivery of any of these messages, must at its peril see to it that within the limits of Georgia such order is made conformable to the statute of that State. If Georgia may adopt a rule of this kind, then other States may in their discretion adopt a different order and all messages at State lines will be subject to change as required by the State statutes. It was precisely such a condition of things which the constitutional provision was designed to prevent.

Applicable cases in this Court cited and commented on:

Hall vs. DeCuir.

The regulation attempted by the Georgia Statute now in question in the case at bar falls within the principles announced in the case of Hall vs. DeCuir, 95 U. S., 485. In that case a statute of Louisiana was under consideration. It forbade all carriers of passengers to refuse admission to their vehicles to any person of good character or conducting himself properly, etc., and especially forbidding any discrimination on account of color or race. The plaintiff, Mrs. DeCuir, insisted upon admission to a steamboat cabin reserved for white persons. The vessel was upon the Mississippi River, engaged in interstate commerce, and the plaintiff was journeying from New Orleans to Hermitage, both within the State of Louisiana.

The State Supreme Court of Louisiana construed the act as having application only to internal commerce, and therefore valid. This decision came before this Court for re-examination, and this Court reversed the judgment in favor of Mrs. De Cuir upon the ground that the statute acted upon carriers engaged in interstate commerce, and required them to give to all persons traveling in that State equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. As such, it was deemed to trench upon the powers exclusively reserved to Congress. The reasons given by Chief-Justice WAITE, in announcing the opinion of the Court, exactly fit the case at bar.

"The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

"But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which

the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers could conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other to be kept separate. Uniformity in the regulations by which he is governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all—white and colored—in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law, or civil law where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the Court in Welton vs. The State of Missouri, 91 U. S., 282, 'inaction (by Congress) * * * is 'equivalent to a declaration that interstate commerce shall remain free and 'untrammelled.'"

"Applying the principle to the circumstances of this case, Congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana and without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State Court, seems to take away from him that power *so long as he is within Louisiana;* and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the States."

Same principles, see

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, on p. 204, as to effect of non-action by Congress.
Brown vs. Huston, 114 U. S., 622, on p. 631.
Pickard vs. Pullman Southern Car Co., 117 U. S., 34.
Wabash, St. Louis & Pacific R. R. vs. Illinois, 118 U. S., 557.
Walling vs. Michigan, 116 U. S., 446.
porter, Vol. 6–454.
Corson vs. Maryland, Supreme Court Reporter, Vol. 7–655, 120 U. S., 502.
Case of The State Freight Tax, 15 Wall., 232.
Smith vs. Alabama, 124 U. S., 465, 475.
R. R. Co. vs. Husen, 95 U. S., 465, on p. 470.
Carton vs. Railway Co., 59 Iowa, 148.

It may be claimed that this statute of Georgia falls within that class of regulations which the States may adopt in the absence of any congressional regulation upon the subject.

To this suggestion the first answer is that in the Telegraph Act of July 24th, 1866, now Section 5266

of the Revised Statutes, there is congressional action conferring the right to construct, maintain and operate telegraph lines, and regulating the order of transmission of messages by all telegraph companies which have accepted the provisions of that act.

But independently of this legislation the nature of the thing sought to be affected and controlled by this legislation of the State of Georgia is such that it alone is susceptible of national control. The important Act of Congress of July 24, 1866 (14 Stats., 221), in its history and its provisions is a most emphatic recognition by Congress of the national character of the telegraph service (see legislative history of this act in our brief in the case of Fishback vs. The Western Union Telegraph Company at the present term, and also the opinion of this Court by HARLAN, J., in the case of the United States vs. U. P. Ry. Co. and The Western Union Telegraph Co., 160 U. S., 1, decided at the present term). Telegraphic communication is not local, nor does it belong to that class of subjects which are so far local or limited in their character that they may be said to be subject to State authority so long as Congress refrains from acting upon them.

Cooley vs. Board of Wardens.

The distinction between the two classes of cases is clearly set forth in opinion in Cooley vs. Board of Wardens, 12 How., 299, 319, where CURTIS, J. says:

"The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single, uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question

(which was pilotage), as imperatively demanding that diversity which alone can meet the local necessities of navigation. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Kentucky Bridge Case.

In Covington, &c., Bridge Co. vs. Kentucky, 154 U. S., 211, Justice BROWN very concisely classified the cases in which it had been held the States might act, where no Congressional action had been had, thus:

"Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots; Cooley vs. Philadelphia Board of Wardens, 12 How., 299; Steamship Co. vs. Jolliffe, 2 Wall., 450; *ex parte* McNeill, 13 Wall, 236; Wilson vs. McNamee, 102 U. S. 572; Quarantine and Inspection Laws and the policing of harbors: Gibbons vs. Ogden, 9 Wheat., 1, 203; City of New York vs. Miln, 11 Pet., 102; Turner vs. Maryland, 107 U. S., 38; Morgan Steamship Co. vs. Louisiana, 118 U. S., 455; the improvement of navigable channels: County of Mobile vs. Kimball, 102 U. S., 691; Escanaba Co. vs. Chicago, 107 U. S., 678; Huse vs. Glover, 119 U. S., 543; the regulation of wharfs, piers and docks; Cannon vs. New Orleans, 20 Wall., 577; Pachet Company vs. St. Louis, 100 U. S., 423; Packet Company vs. Collettsburgh, 105 U. S., 559; Transportation Company vs. Parkersburg, 107 U. S., 691; Onachita Packet Co. vs. Aiken, 121 U. S., 444; the construction of dams and bridges across the navigable waters of a State: Wilson vs. Blackbird Creek Marsh Co., 2 Pet., 245; Cardwell vs. American Bridge Co., 113 U. S., 205; Pound vs. Tuuck, 95 U. S., 459; and the establishment of ferries: Conway vs. Taylor's Executors, 1 Black, 603.

Of this class of cases it was said by Mr. Justice CURTIS in Cooley vs. Board of Wardens, 12 How., 299, 318: "If it were admitted that the existence of this power in Congress, like the power of taxation, is com-

patible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this Court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations.

* * * * * *

"But wherever such laws, instead of being of a local nature, and not affecting interstate commerce, but incidentally, are national in their character, the non action of Congress indicates its will that such commerce shall be free and untrammeled, and the case falls within the third class of those laws wherein the jurisdiction of Congress is exclusive (Brown vs. Houston, 114 U. S., 622; Bowman vs. Chicago, &c., Railway, 125 U. S., 465)."

In its essential nature and purposes the receipt, transmission and delivery of telegraphic messages are the very opposite of matters of a *local* or limited nature, such as above mentioned. The Act of Congress of July 24, 1866, above referred to, embodies and expresses the judgment of Congress as to the national character of the telegraphic service. This legislative judgment concurs with the judgment of this Court on the precise point in the *Pensacola Case* (96 U. S., 1), and the other cases below referred to in this brief.

Telegraph Company vs. Texas.

In Telegraph Co. vs. Texas, 105 U. S., 460, it was held that the business of telegraph companies is interstate commerce, and that the companies occupy the same relation to commerce as a carrier of messages, as

a railroad company does as a carrier of goods. A tax of one cent per message was held unconstitutional as to all interstate messages. This Court made the emphatic and striking declaration in this case that the "business" of the Telegraph Company, *i. e.*, the receipt, transmission and delivery of messages, "is commerce itself." "*The company is an instrument of commerce* AND ITS BUSINESS IS COMMERCE ITSELF" (p. 464). If this is true, this is decisive of the present case in our favor. Admitted that the "business is commerce itself" in the constitutional sense, this carries with it as a necessary consequence freedom from local control, and that such business is subject only to national regulation.

Telegraph Company vs. Pendleton.

In Western Union Telegraph Company vs. Pendleton, 122 U. S., 347, the question of the effect of a statute of Indiana, requiring delivery within certain limits of interstate messages, was before this Court. In that case the message was sent from a point in Indiana to a point in Iowa, and the penalty was sued for because of want of delivery in Iowa in conformity to the provisions of the statute. The statute of Indiana, when compared with the statute in the case at bar, furnishes a striking illustration of the necessity of treating the whole matter of interstate messages, the order in which they shall be sent, their transmission and delivery, as so exclusively a matter of national concern, that the States are not, by the Constitution, permitted to interfere with it. In the Indiana statute there was a provision that messages for newspapers might be sent out of their order, and that communications to and from

officers of justice should take precedence of all others. If other States should legislate upon this subject, and require still a different order of transmission and delivery, we might have one message subject in its transmission from point of origin to destination to as many separate rules as to how it should be handled as there were States through whose borders it passed, and each enforced by appropriate penalties. As in Hall vs. De Cuir this Court held that such interference with interstate carriers of passengers was improper which required a change classification at each State line, so here the required change of treatment of interstate messages, which stand on the same footing, is alike intolerable. In the Pendleton case, *supra*, under the Indiana act, the statute was held unconstitutional as applied to delivery of messages in other States than Indiana.

But the language of the opinion would equally include the attempt in the case at bar to regulate the transmission and delivery of interstate messages. The Georgia statute undertakes, as in the Indiana case, to regulate the conduct of the telegraph company in handling this message as well in Alabama as in Georgia and to affix penalties for failing to comply with all of its requirements. As to such attempt the following extract from the opinion of the Court, delivered by Mr. Justice FIELD, in Telegraph Co. vs. Pendleton is pertinent:

"The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would inevitably follow with reference to telegraphic communications between citizens of different states, if each state was vested with

power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each state. Indiana, as seen by its law given above, has provided that communications for or from officers of Justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order in which they are received, and punishes as an offense a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other States in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in case of fire or other calamity, and telegrams respecting the sickness or death of relatives."

On the subject of the *delivery* of messages, the learned Justice holds this language:

"Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is, and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city, being many miles in extent, was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State."

* * * * * *

"The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the State

does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require."

What has been thus said by this Court as to inevitable conflicts in law respecting the power of a State to regulate by statute the order of transmission of interstate telegrams, applies with equal force to statutes regulating the mode of delivery of telegrams. A telegram must be delivered. Without it the transmission amounts to but little, if anything. Delivery is, in fact, part of the transmission and an integral portion of the service or duty of the company in the transmission. Delivery is essential to the completion of the transmission. This is recognized in the Act of Congress of July 24th, 1866, which simply refers to "transmission," thus including in this term the complete services from the receipt of a telegram to its delivery to the addressee. It is easy to see that different State Legislatures might differ in their enactments as to modes of delivery and enforce such rules by penalties for their violation. It is not a question of the reasonableness of the statute in question, although as we show below this statute as construed by the Supreme Court of the State is unreasonable and subject to great abuse. If such a statute can be enacted at all, its provisions will rest in the discretion of the Legislature.

Gloucester Ferry Case.

This precise point was adverted to by Mr. Justice FIELD in the case of Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, on page 205:

"It is idle to say that the interests of the State would prevent oppressive taxation. Those engaged in foreign and interstate commerce are not bound to trust to its moderation in that respect; they require security, and they may rely on the power of Congress to prevent any interference by the State until the act of commerce—the transportation of passengers and freight—is completed."

In this case the Court adjudged that the business of receiving and landing passengers and freight is incident to their transportation by ferry, and that a tax levied by the State of Pennsylvania upon such receiving and landing is a tax upon interstate commerce, which was not subject to such exactions by the State of Pennsylvania.

It was claimed that as a ferry could not be established from Gloucester, N. J., to Philadelphia, Pa., without the consent of the State of Pennsylvania, that the State of Pennsylvania had the right to tax the business of transportation on such ferry in respect of the landing and receiving of passengers and freight at the wharf in Philadelphia, although it could not tax the business of the transportation of persons or property between these two points. The Court, through Mr. Justice FIELD, denied that proposition, saying (p. 203):

"The business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to—indeed, is a part of—their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of persons or property at some point and putting them down at another.* A tax therefore upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between two States involved in such transportation."

So here the due transmission of the interstate message in question implies the receipt, transmission and delivery, and the delivery is no more a separate service, local in its nature, than the receiving or landing of passengers or freight was a separate service in the *Gloucester Ferry Case*, and so subject to state control.

It seems apparent that a State cannot have the power to regulate the transmission and delivery of interstate messages within its own borders. Take as an illustration Section 2 of the Statute of Georgia in the case at bar *(ante*, p. 2*)*. To impose this obligation upon the telegraph company as to telegrams coming into the State from without is to impose a burden upon the business, and is equivalent to imposing a tax upon each message. The messenger service must be paid for either by the telegraph company or by its patrons. Such burden imposed in this indirect way upon interstate messages may considerably exceed the tax which was declared illegal in Telegraph Co. vs. Texas, *supra*.

The Wabash Railway Case.

It may be claimed that the conduct of the telegraph company in the handling of interstate messages may be controlled and directed by the State of Georgia, *so far as the work is done within the limits of that State*. This seems to have been the ground upon which the Supreme Court of that State proceeded in upholding the law (Record, p. 23). But this ignores the fundamental fact that the service of the transmission and delivery of a message are not several and distinct services, but one single connected integral service. As to the right of the State to thus apportion the part of the ser-

ice which lies within its borders, and regulate it in any particular, the case of Wabash, &c., Railway Company vs. Illinois, 118 U. S., 557, is controlling, and is exactly in point. In that case an attempt was made to enforce a statute of Illinois regulating charges for carriage of freight, by making it applicable *within the State of Illinois* to a shipment from Peoria to New York City. Such shipment was claimed to be subject to the provisions of the Illinois statute *as to that portion of the carriage within that State.*

Upon that question Mr. Justice MILLER, at page 572, after quoting from Hall vs. De Cuir, says:

"The applicability of this language to the case now under consideration of a continuous transportation of goods from New York to Central Illinois or from the latter to New York is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, *it is but one voyage*, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by the Act of the Illinois Legislature so much as the charge for transportation, and, in the language just cited, if each one of the States through whose territories those goods are transported can fix its own rules for prices, *for modes of transit, for times and modes of delivery*, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to.

"It was," in the language of the Court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted."

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce

among States and with foreign nations, as this Court has said before, was among the most important of the subjects which prompted the formation of the Constitution (Cook vs. Pennsylvania, 97 U. S., 566, 574; Brown vs. Maryland, 12 Wheat., 419, 446). And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation, or taxation, *or any other restrictive regulation* interfering with and seriously embarrassing this commerce."

That the species of regulation attempted in this statute of Georgia is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has been said. If it be in fact a regulation of commerce between the States, then it follows that it can only be done by the Congress of the United States under the commerce clause of the Constitution.

II.

The statute of Georgia now in question, as construed and applied by the Supreme Court of Georgia in this case enforcing the penalty denounced in said statute, is a regulation of commerce within the meaning of the Constitution of the United States.

The statute in question is comprehensive in its scope, dealing with the whole subject of the receiving,

transmission and delivery of all messages, including interstate messages, and prescribing for violations of duties liabilities greater than those which under the common law and the lawful regulations of the telegraph company would otherwise exist, and creating penalties for violation of duties, which have no existence except by virtue of this statute. Moreover, it undertakes to prescribe for transmission of cipher messages a liability differing from the liability of the companies at common law and under the lawful regulations of the company, and it enforces such new-made liability by penalties, in addition to actual damages.

So, also, if it be assumed that the receiver of a message is entitled to recover for damages for mistakes or delays in the transmission of the message, still this statute imposes a liability on the telegraph company which did not exist before, for at common law no right of action would exist in favor of either the sender or the receiver of a message *unless the delay in transmission or delivery resulted in actual injury.* But this statute gives a remedy for a violation of its terms, to wit, for a failure to receive and transmit impartially, or for a failure to make due delivery, *irrespective of any actual damages*, and thus creates a liability and gives a statutory right of action for the $100 penalty where no liability before existed. This is clear from the terms of the Georgia statute and is demonstrated by the proceedings and judgment of the Court in this case. Here the plaintiff sued both for actual damages which he alleged were sustained by him, and also for the $100 penalty prescribed by the statute, because, as alleged in the declaration (Record, p. 10), the defendant failed " to transmit and deliver the said despatch with impartiality, good faith, and with due diligence ; " but the Supreme

Court of Georgia held that the plaintiff was not entitled, on the facts shown by the record, to recover any actual damages. Notwithstanding this it also held that he was still entitled to recover the statutory penalty of $100 and costs and gave him judgment accordingly. The point to note therefore is that the Georgia statute creates a liability and a penalty where no actual damages have been sustained and where there would be no liability at common law. This we submit is a cardinal consideration in this case, viz.: liabilities and penalties are newly created by the statute which do not otherwise exist and which are created without reference to actual damages sustained by the sender or the receiver of the interstate message. For it will be noticed that the Georgia statute in terms provides that the said penalty "may be recovered by suit by either the "sender of the despatch or the person to whom sent "or directed, whichever may first sue." How can it be predicated of such a statute that it is not a regulation of the commerce on which it lays such burdens?

The interstate message "is commerce itself;" so says this Court; and if so, then every burden laid upon it by legislative authority is a "regulation" (R. R. Co. vs. Husen, 95 U. S., on p. 470, and cases cited). If Congress had, as respects interstate messages, passed such an act as the Georgia Act it would be a "regulation" of commerce between the States, and therefore valid. Is such legislation by a State any the less a "regulation" so far as relates to interstate messages, and therefore invalid?

Such a statute as that of the State of Georgia is contrary to what may fitly be called the tacit regulation of this subject by Congress. By "tacit regulation" we

refer to what is said on this subject in the case of Hall vs. De Cuir, *supra*, where Chief-Justice WAITE says :

" This power of regulation [of commerce] may be " exercised without legislation as well as with it. By " refraining from action, Congress, in effect, adopts as " its own regulations those which the common law or " the civil law where that prevails, has provided for " the government of such business and those which the " States in the regulation of their domestic concerns " have established, affecting commerce but not regulat- " ing it within the meaning of the Constitution. In " fact, Congressional legislation is only necessary to " cure defects in existing laws, as they are discovered, " and to adapt such laws to new developments of trade. " As was said by Mr. Justice FIELD, speaking for the " Court in Welton vs. State of Missouri, 91 U. S., " 282 : ' Inaction [by Congress] is equivalent to a " ' declaration that interstate commerce shall remain " ' free and untrammeled.' "

The distinction here is between rights of action arising at common law or under the general doctrines of jurisprudence, and State statutory penalties levied directly with respect of the very act of interstate commerce. Congress by not acting may have considered that no regulation on the subjects dealt with in the Georgia Act was necessary, or it may have considered that the common law with its stringent rules as to the liability of telegraph companies is, if applicable to interstate telegraphic communication, all the legislation that the public good requires. At all events, in the language of this Court in the De Cuir case above quoted, " If the public good requires such legislation, it must come from Congress and not the States."

The Georgia act confessedly provides for a penalty where no injury has been suffered—a penalty in addition to actual damages, and in respect of the *very act of interstate commerce itself.* In this case the penalty

is limited to $100, but if valid its amount is limited solely by the discretion of the Legislature. The Georgia act, therefore, rests on no necessity. It seems framed for the purpose of encouraging prosecutions against the telegraph company by giving rights of action, where no damage has been sustained. It even gives a right of action in cases where the party has been benefited and not damaged; as, in this case, if James was damaged by failing to get the message in time, Tullis & Co., who sent it, were correspondingly benefited; and yet, under the provisions of this statute, Tullis & Co. in a scramble for statutory spoils might have brought their action first and recovered the penalty. In stirring up strife and litigation, this statute is open to more objections than the ordinary *qui tam* action. If the matter of charges for transportation in the State of Illinois of such a charter as existed in the case of the Wabash Railway Company above cited could not be controlled by the State, it is difficult to see how such unnecessary and pernicious legislation as that of the State of Georgia can be sustained. It may impose heavier burdens upon the interstate commerce conducted by the telegraph company than in the ordinary regulation of rates which has received the condemnation of this Court, or the one cent per message tax condemned in Telegraph Company vs. Texas, *supra*.

OUR PROPOSITION, *therefore, is that a State statute relating and applied to interstate messages, creating, as respects their receipt, transmission and delivery, a liability not existing at common law and not resting upon any actual damage as the ground and foundation of such liability, is a regulation of commerce and trammels and*

restrains it, and one which will give rise to infinite and incalculable confusion, conflict, abuse and mischief.

The Georgia statute as construed and applied in this case regulates commerce by overturning the lawful rules, regulations and contract of the parties.

We have said above that this Georgia Act is a comprehensive statute intended to regulate the whole business of the receipt, transmission and delivery of messages, including interstate messages. It changes the liability of the company as it exists under the rules and principles of the law and undertakes to create liabilities in certain cases contrary to reasonable rules and regulations of the company which have been held good by this and other Courts. For example, this Court held in the case of Primrose vs. The Western Union Telegraph Co. (154 U. S., 1), as correctly set forth in the head note that

" a stipulation between a telegraph company and the sender of the message that the company shall not be liable for mistakes in the transmission or delivery of a message, beyond the amount received for sending it, unless the sender orders it to be *repeated* by being telegraphed back to the originating office for comparison, and pays half that sum in addition, is reasonable and valid."

The third section of the Georgia statute enacts as follows:

" That in all cases the liability of said companies for " messages in cipher, in whole or in part, shall be the " same as though the same were not in cipher,"

which is a provision unreasonable in itself and directly in conflict with the decision of this Court in the Primrose case, and the law as held in England and nearly all

of the States in this country. As this Court has said in the cases above referred to in this brief, interstate commerce in this country is conducted subject to the general rules of the common law or civil law where that prevails. By not legislating, Congress, in effect, sanctions and tacitly adopts the rules of general jurisprudence, as applicable to interstate commerce.

It is undoubtedly competent for the parties interested in interstate commerce, the consignor or consignee of goods, or the sender or receiver of telegraphic messages to make any reasonable rules and regulations concerning the conduct of that business and the liability of the parties thereunder. Such a contract was made, as appears by the record in this case, between the parties sending the message and the defendant telegraph company. The senders of the message in question were John W. Tullis & Co., of Eufaula, Alabama. The declaration or complaint alleges that on the 4th day of November, 1890, the said *John W. Tullis & Co.*, having paid the corporation's charges therefor, sent by it the said despatch (Record, p. 9). It appears by the record, and is an undisputed fact (Record, pp. 12 to 12; 17 to 21), that the said message was sent by the said Tullis & Company, written on a telegraphic blank of the company such as was held valid by this Court in the case of Primrose vs. The Western Union Telegraph Co., *supra*. Among the conditions in the said blank, to which the said Tullis & Co. consented, was the following:

"To guard against mistakes or delays, the sender of "a message should order it repeated; that is, tele- "graphed back to the originating office for compari- "son. For this, one-half the regular rate is charged "in addition. IT IS AGREED between the sender of the "following message and this company that said com-

" pany shall not be liable for mistakes or delays in " the transmission or delivery, or for non-delivery, of " any unrepeated message beyond the amount received " for sending the same; nor for mistakes or delays in " the transmission or delivery, or for non-delivery, of " any repeated message beyond fifty times the sum re- " ceived for sending the same unless specially insured, " nor in any case for delays arising from unavoidable " interruption in the working of its lines, or for errors " in cipher or obscure messages " (Record, pp. 12, 13).

The answer alleged (Record, p. 12) that the message was sent under the said conditions, that it was not repeated :

Wherefore, " the said company is not responsible " beyond the amount received for tolls for sending the " said message."

But this defense was overruled, the Court instructing the jury as follows (Record, p. 16) :

" I charge you that if the defendant, the telegraph " company, undertook to transmit to this place [the " message] which had been paid for at the other end of " the line [Eufaula] and did fail to deliver the message " to James within a reasonable time from the time it " was received, the plaintiff is entitled to recover for " the failure to deliver one hundred dollars as a penalty " fixed upon that act by law."

The point to be here observed is that the parties concerned made, in the State of Alabama, a valid contract in relation to the liability of the telegraph company in respect of the receipt, transmission and delivery of this message, a contract which accompanied the message from its receipt to its delivery to the addressee, which contract the Statute of Georgia, as construed by the Supreme Court of that State in this case, disregards and nullifies, by holding the company liable, irrespective of any actual damages sustained by the

plaintiff and in face of the stipulation in the contract, to a penalty of one hundred dollars.

OUR PROPOSITION *is that a statute of a State that has such an effect is, as applied to this message, a regulation of interstate commerce contrary to the Constitution and in violation of a lawful contract between the parties made under and in pursuance of the Constitution.*

That the above views and conclusions are sound appear from further considerations arising out of the facts of this particular case.

The message in question was delivered to the telegraph company by Tullis & Co. at Eufaula; it related to the business of the senders. *It was their message.* They directed the company to send the same to D. W. James, at Blakely, Georgia. Immediately over the message thus sent were the words: "*Send the following message subject to the above terms*"—referring to the terms and conditions printed on the blank—"*which are hereby agreed to.*" It was addressed to "D. W. James, Blakeley, Georgia" (Record, p. 13).

The declaration alleges that

"On the 4th of November, 1890, the said John W. Tullis & Co. having paid the corporation charges thereon, sent by the said corporation"

the said message (Record, p. 9). This allegation is made because payment of charges is made a condition precedent by the statute to an incurring of its penalty of one hundred dollars (Sec. 1). The charges thus paid were the charges of the company for the *entire service* of receiving, transmitting *and delivering* the message, in accordance with the terms under which it had been

received, and which terms had been agreed to by the senders and the telegraph company. It is obvious that the service thus contracted for was not completed until the message was delivered. The transmission and delivery is a unit service. The message did not lose its interstate character when it reached the State line of Georgia or when it was received in the office of the company at Blakeley, but it retained such interstate character until the service for which the sender had paid was fully accomplished by the delivery of the message. The receipt at Blakeley was a mere incident in the service of the transmission of this message, just as the relaying of the message at any intermediate station would have been for the purpose of receiving it from one line, and sending it over another line. The *delivery* of this message was as much part of the interstate service as the transmission, precisely on the principle upon which this Court held that the "landing" of passengers from the ferry (in *Gloucester Ferry vs. Pennsylvania, supra*) was as much a part of the interstate commerce between the States in question as the ferriage itself.

The Supreme Court of Georgia proceeded upon the erroneous principle that the interstate character of the message *ipso facto* ceased on its receipt at the company's office in Blakeley, and that the delivery was a detached and independent service, and as such subject to State regulations (Record, p. 23). For the reasons above given this is an erroneous view.

THE CASES HOLD THAT THE DELIVERY IS A PART OF THE TRANSMISSION, AND ESSENTIAL TO THE COMPLETION OF THE ACT OF TRANSMISSION.

Thus in an action to recover a statutory penalty: Held that a message not delivered is not transmitted.

The law means not merely that the message shall be started, but that it shall reach the person addressed. It must be delivered to him, and delivery is a part of the transmission.

Western Union Telegraph Co. vs. Lindley, 62 Ind., 371.

So the statute imposing a penalty for failure to transmit accurately and promptly applies to a failure in delivery, as the undertaking to transmit is a continuous one and is violated if there is failure to use diligence, good faith and care to make a reasonably prompt delivery.

Julian vs. Western Union Telegraph Co., 98 Ind., 327.

"A prompt delivery was of the essence of the contract [of transmission], and a failure in that respect was such a breach of it as to authorize the recovery back of the consideration paid, if a right to do so could be maintained in other respects."

Western Union Telegraph Co. vs. Adams, 75 Tex., 531.

A telegraph company, in the absence of a special contract to the contrary, is bound to make a copy of the message and deliver it to the person addressed. Transmitting a message to such persons through a telephone is not a sufficient compliance with the contract.

Brashers vs. Western Union Telegraph Co., 45 Mo. App., 433.

The Court in this case approve the following statement of the law by Gray in his work on "Communications by Telegraph," page 182, viz.:

"The telegraph company does not, as the Govern-
" ment does, undertake to transport and deliver the
" paper upon which the employer writes the intelli-
" gence that he wishes to have communicated. It
" undertakes to transmit, with the aid of electricity,
" the intelligence contained in that paper to the place
" of destination, *and there to write it out and deliver it*
" *to the person addressed.*"

And the Court adds:

"This is undoubtedly the usual undertaking of a "telegraph company, and in the absence of a special "contract to the contrary anything short of it would be "a failure of duty to the sender. The latter has a right "to expect and demand that a copy of the message be "promptly delivered to the addressee in person, if he "is accessible."

When the addressee of a telegram, not sent in the care of any one, is not at the place addressed, it is not sufficient for the company to leave the telegram at such place, but reasonable diligence must be used to find him.

Western Union Telegraph Co. vs. de Jarles, 27 S. W. Rep., 792.

See, also, Herron vs. Western Union Telegraph Company, 57 N. W. Rep., 696.

IT IS THE CONSISTENT AND UNIFORM DOCTRINE OF THIS COURT that interstate railroad transportation of freight and passengers is a subject national in its nature, and admitting only of a uniform plan of regulation. In the numerous cases on this subject, it may be truly said that this Court has jealously guarded such interstate commerce from attempted regulation by the various States. The subject of interstate telegraph business, equally with interstate railroad transportation, is held by this Court to be national in its nature, and admitting only of one uniform plan of regulation. Thus this Court, in Telegraph Co. vs. Texas (105 U. S., 464), speaking by Chief-Justice WAITE, after referring to the *Pensacola case*, says:

"The telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods; both companies are instruments of commerce, *and their business is commerce itself.* * * * A State statute, so far as it operates on private messages sent out of the State, is a

regulation of foreign and interstate commerce, and beyond the power of the State. This is fully established by the cases already cited."

The converse of this is equally true in respect of messages sent from without the State to a point within it. If a State may legislate in respect of the delivery of an interstate message, it may equally legislate in respect of its transmission, of which the delivery is but a part. If one State may legislate on these subjects, all may legislate, and the result would be a hopeless confusion and conflict of regulation. The mischiefs and evils which would arise from State legislation with respect to the order of transmission of interstate telegrams so forcibly pointed out in the *Pendleton case*, applies with equal force to statutes regulating the mode of delivery of telegrams, for, as we have above shown, a telegram must be delivered to complete the service of transmission. It is therefore easy to see that different State Legislatures will differ in their enactments as to modes of delivery, and enforce such rules by penalties for their violation. This contract, for example, was made in Alabama with a citizen of Alabama. The State of Alabama would have as much right to impose a statutory penalty against the company, and in favor of Tullis & Company, for failure to deliver this message, as the State of Georgia would have to create a like penalty in favor of the addressee of the message. But this Court has held, in the *Pendleton* case, that Alabama would have no such right as to the service in Georgia; and, on the same ground and principle, the State of Georgia is equally disabled from passing such a statute. The life of commerce is its freedom, and the States cannot be permitted, by penal legislation of

this kind, to create liabilities and to impose burdens not necessary to protect any actual right or duty by enacting statutes attempting to regulate interstate telegraphing as respects the order or mode of transmission and delivery of telegrams which originated in other States.

THE PLAINTIFF'S DECLARATION in this case counted upon an alleged delay in the transmission and delivery of the message in question (Record, p. 10). Suppose it had turned out on the proof that the delay had occurred in the State of Alabama. Clearly, under the decision of this Court in the *Pendleton case*, the plaintiff's action based on the Georgia statute could not have been maintained. Suppose the delay in the transmission had occurred after the message had reached Georgia, but before it reached Blakeley, clearly this action, based on the Georgia statute, could not be maintained, because the statute would be laying its hands directly on the act of transmission of an interstate message, which is adjudged by this Court to be commerce itself. If this be so, then the action on the Georgia statute for the penalty will no more lie for delay in delivery at Blakeley, for, as above shown, the delivery is either an incident to, a sequel of, or, more properly speaking, an integral part of the transmission, which until delivery be made, is not completed.

III.

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully,

JOHN F. DILLON,
RUSH TAGGART,
GEO. H. FEARONS,
Attorneys for Western Union Telegraph Company.